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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; WC Docket No. 01-338

Dear Ms. Dortch:

Covad herewith submits this letter on behalf of the below-signed carriers: Covad Communications, PacWest Telecomm, Inc., Network Telephone, Lightship Telecom, and KMC Telecom.

We understand that in response to the reviewing court's remand of the *Triennial Review Order*, the Commission is considering extending the *TRO's* "use restrictions" on Enhanced Extended Link facilities, ie., EELs, to apply them to other UNEs, such as high capacity loop facilities, used to provide competitive local telecommunications services, including data communications. Presumably the Commission is considering such a step in response to the court's rejection of the FCC's prior conclusion that long-distance services are not "qualifying services," 359 F.3d at 591, and its related suggestion that a "service-by-service analysis of impairment" might well lead the Commission to reintroduce a use restriction targeted at the use of UNEs to serve the long-distance market "where robust competition . . . belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.* Similar concerns might lead the Commission to consider use restrictions applicable to wireless carriers in light of the court's similar statements relating to competition in the wireless market. *Id.* at 575-576.

We take no view on whether a use restriction targeted at facilities used to access long-distance networks (or facilities used to offer wireless services) is necessary or appropriate, or whether those markets are in fact characterized by "robust competition." We write instead because the EELs restrictions represent an ill-fitting means to accomplish the Commission's objectives, and would have unintended spillover effects on competitive local services where impairment clearly exists, and where the level of retail competition is in no way "robust." The EELs restrictions represented a specific solution to a narrow issue, namely preventing interexchange carriers from accessing EELs facilities for the provision of long-distance voice services. They simply do not, and should not, be viewed as providing a useful framework for ensuring facilities based competition generally. Application of these restrictions to other UNEs utilized to provide



competitive telecommunications services, including data services, also would not comport with prior analyses and conclusions by the Commission left undisturbed by the USTA court. The Commission should avoid creating new ambiguities and uncertainties in this area, and creating new reviewable issues.

We and other competitive carriers that provide facilities-based data services rely heavily on high-capacity loop unbundled network elements as a necessary component of our competitive data telecommunications services. For example, Covad currently offers data telecommunications services to business customers to the tune of more than 222,000 access lines, including both high capacity loop facilities and standalone copper loops.<sup>1</sup> Covad also offers data telecommunications services to consumers to the tune of more than 302,000 access lines, using line-shared and line-split copper loops.<sup>2</sup>

Any application of the EELs restrictions to UNEs generally would have unintended spillover effects precluding the provision of competitive data telecommunications services. This could happen because many of the same characteristics that distinguish long-distance access services from local voice services (and thus could be used to create a use restriction), also happen to distinguish data services from local voice services. Thus, for example, the existing use restriction for EELs facilities is tied to such features as local dialtone, local telephone numbers and lines associated with local switches. While it is true that long-distance lines have none of those features, neither do lines used to provide data services. Thus, while the Commission's EELs use restrictions served the purpose of limiting access to EELs from a specific market found to be competitive – namely, long distance services – those restrictions are defined too narrowly to address the competitive situations in all potential telecommunications markets, including data telecommunications.

Rather than relying on the narrowly crafted EELs restrictions, the Commission's "qualifying services" test should look to the same principle the Commission adopted in its *Triennial Review Order*: "those telecommunications services offered by requesting carriers in competition with those telecommunications services *that have been traditionally within the exclusive or primary domain of incumbent LECs*."<sup>3</sup> This broad principle is a far better indicator of the historical monopoly characteristics of facilities for which unbundling is warranted than the narrowly constructed EELs restrictions, which target only the exclusion of long distance voice service from access for a specific type of facilities, namely EELs. To the extent the Commission is concerned that its previous qualifying services definition too broadly included non-qualifying services, its definition

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<sup>1</sup> See "Covad Communications Group Announces Third Quarter 2004 Results," Press Release, Oct. 20, 2004, available at [http://www.covad.com/companyinfo/pressroom/pr\\_2004/102004\\_news.shtml](http://www.covad.com/companyinfo/pressroom/pr_2004/102004_news.shtml).

<sup>2</sup> See *id.*

<sup>3</sup> See *Triennial Review Order*, para. 140.



should be refined rather than replaced with the EELs restrictions. For example, one example of such a refinement of the definition of qualifying services could be “*wireline local telecommunications services, including local exchange services, such as POTS and local data services, and access services, such as xDSL and high-capacity services*, that have been traditionally within the exclusive or primary domain of incumbent LECs.”

Furthermore, this broad principle would comport with the statute’s requirement that UNEs be used by a “requesting telecommunications carrier for the provision of a telecommunications service.”<sup>4</sup> By broadly limiting UNE eligibility to only those carriers seeking to provide telecommunications services, the Commission would not need to engage in a specific analysis of whether individual services contain a telecommunications service component impacting UNE eligibility, which is already the subject of other pending proceedings (e.g., the *Wireline Broadband NPRM*).<sup>5</sup> Rather, the broad principle suggested above would avoid prejudging the outcome of this proceeding, or the outcome of any litigation raising related issues (e.g., the *Brand X* litigation).<sup>6</sup>

This broad, flexible approach is particularly appropriate given the Commission’s own undisturbed rulings in the *Triennial Review Order* that data telecommunications services should be considered “qualifying services” for the purposes of competitor eligibility to access UNEs. In the *Triennial Review Order*, the Commission made clear that qualifying services include “local exchange services, such as POTS and local data service, and access services, such as xDSL and high-capacity services.”<sup>7</sup> Clearly, the D.C. Circuit has not disturbed the Commission’s inclusion of data telecommunications services, such as local data services, xDSL and high-capacity services, in the category of qualifying services. Given the Commission’s own undisturbed findings on this count, the Commission should not take this occasion to create a new reviewable issue for the appeals courts where there is currently none.

The broad principle suggested above also best accommodates a developing marketplace for competitors and incumbents competing over historically monopoly facilities, in the provision of both legacy services like local POTS voice and newer data and packet-based services. Given the mandate of section 706 of the Act, and the Commission’s own stated desire to promote broadband services, it would be particularly unreasonable to deny access to facilities that enable our companies and other facilities-based carriers to compete to provide businesses and consumers additional choices in data

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<sup>4</sup> 47 U.S.C. § 251(c)(3).

<sup>5</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd 3019, 3047, para. 61 (2002) (*Broadband NPRM*).

<sup>6</sup> *Brand X v. FCC*, 345 F.3d 1120 (2003).

<sup>7</sup> See *id.*



telecommunications services. Moreover, it would contradict the goals of section 706 to limit facilities-based competition solely to legacy voice services, rather than also allow competition for data telecommunications services and the new packet-based services they make possible.

Unlike the retail markets for long distance and mobile wireless services, which as stated above the D.C. Circuit implied might be sufficiently competitive to warrant finding non-impairment, the retail markets for both enterprise and mass market data telecommunications services cannot reasonably be found to be sufficiently competitive. Indeed, as explained below, the retail markets for both enterprise and mass market data telecommunications services remain highly concentrated, with one dominant provider – the ILEC – of enterprise data telecommunications services, and at best two dominant providers of mass market data telecommunications services.

As explained in detail in previous submissions in this docket, without access to unbundled loop facilities the market for residential and small business broadband-based services would be a duopoly market. Specifically, the FCC's own data shows that the incumbent telephone companies and cable providers control more than 93% of the nation's broadband access lines.<sup>8</sup>

Moreover, enterprise customers lack a choice even amongst this limited set of two providers. Cable providers have historically focused their network deployment in residential areas, leaving most businesses with the incumbent telephone company as their only broadband option. In fact, as described in the opening comments in this proceeding, recent figures show that cable penetration in the small business segment has actually dropped: "We projected cable modem would surpass DSL in this [the small business] segment by year-end 2003. However, cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited success in the remote office market, reaching only 4.2 percent of the market in 2003."<sup>9</sup>

Nor can the Commission rely on other broadband modalities to compete against the cable-wireline duopoly in the residential market and the wireline monopoly in the enterprise market. Fixed wireless and satellite are not yet real alternatives. By the ILECs own reckoning, there are only 300,000 residential satellite broadband subscribers,

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<sup>8</sup> See *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 5 (December 2003). Specifically, out of a total of 23,459,671 high-speed lines (over 200kbps in at least one direction), RBOCs served 7,266,765 lines, other ILECs served 948,828 lines, and cable providers served 13,684,225 lines.

<sup>9</sup> Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added).



and that number is not expected to grow in any meaningful way over the next four years.<sup>10</sup> Not surprisingly, according to the FCC's latest data, satellite and fixed wireless broadband together account for less than 2% of total high-speed lines in service.<sup>11</sup> There are *no* powerline broadband services commercially available, and the ILECs do not predict that there will be any over the next four years.<sup>12</sup> In sum, even taking the ILECs' own data at face value, there is at best a cable-ILEC duopoly in the broadband residential market, and an ILEC monopoly in the enterprise market. And the ILECs' own predictive judgment is that this state of affairs will remain virtually unchanged over the next four years.

Neutral observers uniformly recognize that "the prospect of a broadband industry dominated by an ILEC-CATV duopoly . . . raises major concerns."<sup>13</sup> The Congressional Budget Office similarly found that the ILEC-CATV duopoly would lead to "too few people . . . subscrib[ing] to a broadband service at too high a price relative to the prices that would prevail in a more competitive market -- a situation known as market failure."<sup>14</sup>

At the risk of belaboring a noncontroversial point, it would be a great mistake, and an unlawful departure from the *USTA* decisions, to deny -- inadvertently or otherwise -- access to bottleneck loop facilities used by competitors to provide data telecommunications services. The court and the Commission both have made clear that impairment is the "touchstone" of any unbundling analysis. Whether the Commission focuses on the extent to which competitors are impaired, as the plain terms of the statute specify, or the extent to which competition in the retail market served by particular facilities is impaired, as the court at times suggests, in either case, robust competition in the market for data telecommunications services requires access to bottleneck loop facilities.

For these reasons, if the Commission does impose a use restriction to guard against the use of UNEs in markets the Commission finds "robustly competitive," it should take steps to make absolutely clear that the restriction is not intended to limit competitors' access to loop facilities necessary to serve the data markets which are

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<sup>10</sup> ILEC "UNE Fact Report" 1-12, Table 9.

<sup>11</sup> See *High-Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 1 (June 2004).

<sup>12</sup> See ILEC "UNE Fact Report," *supra* n. 10.

<sup>13</sup> Ferguson, Charles H., *The Broadband Problem*, Brookings Institution Press p. 139 (2004). See Covad Comments at 29-30.

<sup>14</sup> Congressional Budget Office, *Does the Residential Broadband Market Need Fixing*, CBO Paper, December 2003, at 1.



anything but “robustly competitive.” Accordingly, the Commission should make clear that “data telecommunications services” remain “qualifying services” eligible for UNE access. Further, the Commission should make clear that the provision of stand-alone data telecommunications services does not trigger any new use restrictions applied to standalone unbundled loops, including high capacity loop facilities, standalone copper loops and line shared loops, or standalone unbundled transport facilities. Competitors should remain eligible to access these unbundled loop and transport facilities for the provision of competitive data telecommunications services.

Respectfully submitted,

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